Supreme Court, U.S.
FILED

001874 JUN 15 2001

IN THE

Supreme Court of the United States

PAULO FREYESLEBEN,

Petitioner,

v.

COUNTY OF FAIRFAX, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED

Whether the right to associate as guaranteed by the First Amendment extends to a social relationship between two individuals.

PARTIES TO PROCEEDING

The parties to the proceeding are Paulo Freyesleben (hereinafter "Freyesleben"), the County of Fairfax, Virginia, County Chief of Police J. Thomas Manger, and Police Commander Audrey M. Slyman (hereinafter collectively "the County").

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OPINIONS BELOW

The Order denying the Petition for Rehearing *en banc* is printed in the Appendix ("App.") at App. 1a. The Opinion of the Court of Appeals is not reported and is at App. 3a. The Order of the District Court is at App. 20a. The transcript of the hearing in the district court during which the district court articulated the basis for its order is at App. 6a.

JURISDICTION

The Court of Appeals decided the appeal on January 26, 2001 and denied the Petition for Rehearing *en banc* on March 19, 2001. This Court has jurisdiction under 28 U.S.C § 1254(l).

CONSTITUTIONAL PROVISION

U.S. Const., Amend. I: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . ."

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

On November 5, 1999, Freyesleben filed his Complaint in the United States District Court for the Eastern District of Virginia. After the County filed answers and discovery was completed, the County filed a motion to dismiss pursuant to Rule 12(b)(1) and (6) and for summary judgment pursuant to Rule 56.

On July 21, 2000, the district court granted the County's motion. A timely notice of appeal was filed on August 2, 2000. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

On appeal, the Court of Appeals affirmed the district court in an unpublished opinion. A timely petition for rehearing *en banc* was denied on March 19, 2001.

Statement of Facts

For more than nine years prior to March 10, 1998, Freyesleben was a Fairfax County Police Officer. In the months prior to March 10, 1998, Freyesleben met a young man named Maurice Freeman (whose nickname was Mario) while Freyesleben was working an off-duty detail at MacDonalds, where Freeman worked. Freyesleben befriended Freeman due to a common interest in Brazilian language and culture and a common (and lawful) interest in firearms. After Freeman expressed an interest in owning a firearm, Freyesleben took him shooting at a range. Subsequently, Freyesleben lawfully sold Freeman one of Freyesleben's own firearms. Later that day, after Freyesleben went on duty, he drove his cruiser to Freeman's home and gave him a box of ammunition. The ammunition had been provided to Freyesleben at the police range.

On March 10, 1998, Slyman, then Commander, Mason District Station, informed Freyesleben that she was recommending that his employment with the Fairfax County Police Department be terminated.

On April 17, 1998, Freyesleben was terminated from employment with the Fairfax County Police Department by then Acting Chief of Police Manger on two grounds: 1) violation of

Regulation 201.7(A) (Unbecoming Conduct)[1] and 2) violation of Regulation 201.3 (Obedience to Laws and Regulations)(Larceny).

An appeal hearing before the Fairfax County Civil Service Commission ("Commission"), an agency of the County, was timely held. On November 6, 1998, the Commission found there was insufficient evidence to sustain the charge of violating Regulation 201.3 (Obedience to Laws and Regulations)(Larceny), but found there was "overwhelming evidence" to sustain the charge of violating Regulation 201.7(A) (Unbecoming Conduct), and denied Freyesleben's appeal. The Commission concluded that "Freyesleben's handling of this entire matter fell well below the standards of responsible behavior and exercise of discretion that must be expected of Fairfax County Police officer."

SUMMARY OF ARGUMENT

Under *Board of Directors v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the right to associate extends to the relationship between two individuals.

The Court of Appeals' decision conflicts with the Eleventh Circuit's decision in *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984).

---

[1] "Employees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which brings the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which impairs the operation or efficiency of the Department or employee."

ARGUMENT

I.

THE COURT OF APPEALS' HOLDING THAT A SOCIAL RELATIONSHIP IS NOT PROTECTED BY THE FIRST AMENDMENT CONFLICTS WITH THIS COURT'S DECISIONS

The First Amendment:

> prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate . . . .

Rutan v. Republican Party of Illinois, 110 S.Ct. 2729, 2738 (1990).

Thus, a public employee has a cause of action for violation of his First Amendment rights if a public employer deprived him of a valuable benefit because of the exercise of those rights. See *e.g.*, *Flickinger v. School Board of Norfolk*, 799 F.Supp. 586, 591 (E.D. Va. 1992).

In the case at bar, Freyesleben was terminated by the County because of his association with Freeman and thus deprived of a valuable benefit.

In concluding that Freyesleben's First Amendment rights were not violated, the Court of Appeals held that the:

> association in question clearly was not one of an

> intimate and thus protected nature, see *Roberts* v. *United States Jaycees*, 468 U.S. 609, 619 (1984) . . . .

App. 4a.

In *Board of Directors v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (which followed *Roberts* by three years), however, this Court did not conclude that only associations of an "intimate" nature were to be accorded First Amendment protection. Rather, this Court observed:

> The Court has recognized that the freedom to enter into and carry on certain intimate *or private* relationships is a fundamental element of liberty protected by the Bill of Rights. *Such relationships may take various forms, including the most intimate*. . . . Of course, *we have not held that constitutional protection is restricted to relationships among family members.* (emphasis added).

418 U.S. at 545.

Thus, this Court recognized that the class of protected relationships extends beyond intimate relationships and encompasses *private* relationships not involving family members. Indeed, it was the very fact that the relationship among Rotary Club members was *not* "intimate or private" that caused this Court to conclude that the relationship was not protected by the First Amendment. Thus, private relationships, even if they do not involve "deep attachment and commitments" are protected by the First Amendment. Plainly, a private

relationship between two individuals, as in the case at bar, is within the protected class.

Application of the criteria set out in *Rotary Club of Duarte* demonstrate that the relationship in the case at bar is within the protected class.

First, the association between Freyesleben and Freeman was as small as a relationship can be as it involved only two individuals. *Cf. Rotary Clubs*, where the size of the "local Rotary Clubs ranges from fewer than 20 to more than 900." 418 U.S. at 546.

Second, the purpose of the association between Freyesleben and Freeman was simply one of friendship, a common interest in Brazilian culture, and a common (and lawful) interest in firearms. *Cf. Rotary Clubs*, where the purpose was "'to be a true cross section of the business and professional life of the community.'" 418 U.S. at 546.

Third, the association between Freyesleben and Freeman was, by its nature, selective since it only involved two individuals. *Cf. Rotary Clubs*, which are "required to admit any member of any other Rotary Club to their meetings. Members are encouraged to invite business associates and competitors to meetings." 418 U.S. at 547.

Fourth, the association between Freyesleben and Freeman, by its nature, excluded others from the relationship.

In sum, for the very reasons that this Court concluded that the Rotary Club did not enjoy First Amendment protection,

the private association between Freyesleben and Freeman enjoys that protection.

The decision in *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), cited by the Court of Appeals to support its conclusion, is not to the contrary. App. 5a.

In *Stanglin*, this Court upheld, against a First Amendment challenge, a city ordinance which restricted admission to certain dance halls to persons between the ages of 14 and 18. At the dance hall which brought the challenge, "[m]ost of the patrons are strangers to each other, and the establishment serves as many as 1,000 customers per night." 490 U.S. at 22. The fact that this Court held that the association of 1,000 strangers in a public place did not fall within the protection of the First Amendment does not support the Court of Appeals' conclusion that a private relationship between two individuals, as in the case at bar, is not protected by the First Amendment.

II.

THE COURT OF APPEALS' HOLDING THAT A SOCIAL RELATIONSHIP IS NOT PROTECTED BY THE FIRST AMENDMENT CONFLICTS WITH THE ELEVENTH CIRCUIT

The Court of Appeals' decision is in conflict with the Eleventh Circuit's holding that "one's first amendment right to associate encompasses the right to simply meet with others." *Wilson v. Taylor*, 733 F.2d 1539, 1543 (11th Cir. 1984). Indeed, in direct conflict with the Court of Appeals' holding

that "the Constitution does not recognize a general right of social association" (App. 4a-5a), the Eleventh Circuit held:

> Where two individuals seek to associate with each other, without any evidence of promulgating and advancing political or religious beliefs, they are protected under the freedom of association provision. . . . It is the interaction, the association, which is protected. . . . *A state violates the fourteenth amendment when it seeks to interfere with the social relationship of two or more people*. (emphasis added).

733 F.2d at 1544.

CONCLUSION

To resolve the conflict between the Fourth and Eleventh Circuits and to clarify this Court's right-to-association jurisprudence, this Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed
March 19, 2001

No. 00-2025
CA-99-1656-A

PAULO FREYESLEBEN

Plaintiff-Appellant

v.

COUNTY OF FAIRFAX; J. THOMAS MANGER, Chief of Police, Fairfax County Police Department; AUDREY M. SLYMAN, Captain, Fairfax County Police Department

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en

banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PAULO FREYESLEBEN, *Plaintiff-Appellant*,	)	
v.	)	No. 00-2025
COUNTY OF FAIRFAX, J. THOMAS MANGER, Chief of Police, Fairfax County Police Department; AUDREY M. SLYMAN, Captain, Fairfax County Police Department, *Defendants-Appellees*.	)	

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge
(CA-99-1656-A)

Submitted: January 16, 2001

Decided: January 26, 2001

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion

COUNSEL

Richard E. Gardiner, Fairfax, Virginia, for Appellant. David P. Bobzien, County Attorney, Robert Lyndon Howell, Deputy County Attorney, Ann Gouldin Killalea, Assistant County Attorney, Fairfax, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Paulo Freyesleben filed this action under 42 U.S.C.A. § 1983 (West Supp. 2000), asserting that his termination from employment as a police officer for the County of Fairfax, Virginia, violated his First Amendment right of belief and association. The district court granted the defendants' motion to dismiss or for summary judgment, and Freyesleben appeals.

We agree with the district court that the facts as asserted by Freyesleben do not support the claim that his constitutionally protected right of association was violated. The association in question clearly was not one of an intimate and thus protected nature, *see Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); nor was the association for an expressive purpose protected by the First Amendment. *Id.* at 622. Contrary to Freyesleben's assertion in his reply brief, the Constitution does

not recognize a general right of social association. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). The freedom of belief Freyesleben asserts is essentially his belief that his conduct was appropriate. This assertion entitles him to no relief.

Therefore, we affirm the judgment of the district court. We grant Freyesleben's motion to file a supplemental appendix and to file additional materials. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PAULO FREYESLEBEN,	)	Civil Action No. 99-1656-A
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Alexandria, Virginia
	)	July 21, 2000
	)	10:00 a.m.
COUNTY OF FAIRFAX	)	
Defendants.	)	
	)	
	)	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Pages 1-9)

COMPUTERIZED TRANSCRIPTION OF
STENOGRAPHIC NOTES

PROCEEDINGS

THE CLERK: Civil Action 99-1656-A, Paulo Freyesleben versus County of Fairfax, et al. Will counsel please note their appearance for the record?

MS. KILLALEA: Good morning, Your Honor. I'm Ann Killalea. I'm here on behalf of the defendants.

THE COURT: All right. Is it hard for you to stand?

MS. KILLALEA: Oh, no, I'm fine.

THE COURT: Okay. That's fine.

MR. GARDINER: Good morning, Your Honor. Richard Gardiner for Mr. Freyesleben.

THE COURT: All right. Before the Court this morning is the defendants' motion to dismiss or for summary judgment in which the argument has been fleshed out quite extensively, and in this case, there is no First Amendment right to association or anti-retaliation issue, and so I think, Mr. Gardiner, you need to respond.

My understanding of this case from a factual standpoint is that your client was terminated by the Fairfax County Police Department on a finding of behavior unbecoming an officer and that this was based on facts that I don't believe you contest, correct?

MR. GARDINER: Well, we, we do contest some of the facts as the county sets them out in its reply brief.

THE COURT: But, I mean, the critical facts, as I understand it -- and I don't think you can contest these, because these are in the record -- is that your client sold Fairfax County-issued ammunition, which is for county law enforcement use only, to a civilian.

MR. GARDINER: Well, Your Honor, on that issue, the commission found in favor of my client, so it's --

THE COURT: Well, they didn't find in favor of your client if the facts did not occur. As I understand it, they found that sort of a quasi-criminal theory did not support his termination, but they fully and I think they said vehemently or

extensively supported the finding that your client had engaged in conduct unbecoming an officer.

As I understand it, he used a Fairfax County patrol car to drive to the location. He was dressed in his Fairfax County uniform. What I'm not positive of, was he on his official work shift when this occurred?

MR. GARDINER: He was.

THE COURT: Well them, I mean, how can you really come in here and argue that that's not sufficient grounds to terminate him?

MR. GARDINER: Well, I think, Your Honor, we have, there's evidence that -- that that was a policy that that was within the policies of the county that officers could do that

THE COURT: Could sell county-issued --

MR. GARDINER: I'm sorry, I'm addressing your question about conducting personal business while on duty. We, we will put on evidence that that is, in fact, the case, that that is part of Fairfax County Police policy, to allow officers to

do that, and so I think that becomes a jury question as to whether that was the motive for terminating him.

THE COURT: Well, in the course of your -- because discovery is finished now in this case, correct?

MR. GARDINER: Correct.

THE COURT: In the course of discovery, did you uncover any situations where Fairfax County police officers, while on duty and in uniform, had sold county property to civilians and had not been significantly reprimanded and/or fired for such conduct?

MR. GARDINER: There is no evidence one way or the other on that particular issue. And, Your Honor, that's one of the issues in the case as to whether that was county property that he had, that he had the right to sell. As I said, the commission found that he did not violate their quasi-criminal theory that he had unlawfully sold county property. I think that strongly suggests that even the commission didn't buy the argument that he didn't have the authority to sell that

ammunition.

THE COURT: But even if that were the case, this is an employment action between your client and Fairfax County. As I understand it, he appealed the decision. It went to the commission, which is the next step. The commission affirmed the ultimate decision. He then went to the Fairfax Circuit Court to get further review, correct?

Mr. Gardiner: That's correct.

THE COURT: The circuit court affirmed the decision.

MR. GARDINER: Well, no, the circuit court, Your Honor, found it didn't have jurisdiction to consider the matter and just dismissed it on that ground alone. It never got to the merits.

THE COURT: Yes, but what you're asking a federal court to do is to basically second-guess basically a personnel matter between the county and one of its employees.

MR. GARDINER: Well, if it gives, if it gives rise to

First Amendment concern, that's essentially correct, and I think it does. I mean, under, under the law –

THE COURT: Well, the right to association under the First Amendment is not, I don't think, nearly as broad as you indicate. The Boy Scouts of America case is a very narrow, strange case, but the most important difference between that case and this one is that this case involves conduct, not association.

MR. GARDINER: Well, the conduct is part of the associational activity, and what -- the conduct that he was involved in, that is, the transfer of the firearm, was perfectly lawful activity. The county is not disputing that at this point. And the, the sale -- the transfer of the ammunition, we believe, was also lawful, and I think that's supported by the commission's finding that there was no violation.

THE COURT: All right.

MR. GARDINER: And a termination, Your Honor, an employment termination matter certainly can be a First

Amendment case. I mean, that's -- the retaliatory dismissal cases are generally First Amendment cases.

Hechinger v. School Board of the City of Norfolk, decided by this Court in Norfolk, said that because she exercised her First Amendment rights, that the employee has the initial burden of showing that her conduct was constitutionally protected and that her protected conduct was a substantial factor or motivating factor in the employer's decision to deny the valuable benefit, that is, here the employment. Then the burden shifts to the employer to justify what was done.

So clearly, termination can be a First Amendment activity -- can raise First Amendment claims.

THE COURT: I'll hear from the defense. I don't think it is in this case.

MR. GARDINER: Your Honor, if I might also address on this issue, while I'm up here on the First Amendment claim, the, the county suggests that First Amendment claims can only arise in very, very narrow circumstances, where there's intimate

relations between the parties essentially, and the Rotary Club of Duarte case, which is relied on by the county, I think makes it very clear that any kind -- that all kinds of associations have First Amendment protections.

In fact, it was -- the reason that there was not close relationship between the parties -- between the members of the Rotary Club was exactly the reason why the court said there was no First Amendment Protection, but for all the reasons that the court in Rotary Club said that there were not First Amendment protections to those relationships, they exist in this case, so I think there is a legitimate First Amendment claim here.

THE COURT: All right, I'll hear from the county.

MS. KILLALEA: Your Honor, I don't read the Duarte case or the Roberts case the same way that Mr. Gardiner does. I think that the test -- I think what the court has held is that there's a continuum of relationships ranging from the most

intimate and private to those who are obviously not the least bit intimate and private and that the things that the court pointed out to look at are things to assist in determining where on the continuum that relationship falls.

It doesn't mean that the relationship doesn't have to be intimate and personal. It means that you, you look at these factors in determining whether or not it is sufficiently intimate and personal to be afforded First Amendment protection.

If you look at some of the cases that are cited in both of those cases, there's not one that's exactly on point with Mr. Freyesleben's situation, but this is a, this is a police officer who met a young man while working an off-duty detail in McDonald's on three occasions and took him to the range on one other occasion. I don't believe that that's the type of close, intimate, and personal relationship that the United States Supreme Court had in mind to afford First Amendment protection to in either Roberts or the Rotary Club case. It doesn't have that --

THE COURT: But just so that I'm clear for the record, the conduct unbecoming a police officer, which is the basis upon which the plaintiff was terminated, that conduct wasn't simply meeting with this young man.

MS. KILLALEA: It wasn't meeting with the young man at all.

THE COURT: That's right. The conduct, as I understand it, was the sale.

MS. KILLALEA: Was the sale without first verifying his age, confirming that he didn't have a criminal record. It was the sale in the context of knowing there was one adult in the household that would disapprove of the gun being in the household, was going to his house in a marked police cruiser, in uniform, and blaring the siren in the parking lot at the apartment complex to get him to come outside.

THE COURT: Right. So, I mean, the factual record that we have in this particular case, the nature of the plaintiff, his special role in the community as a law enforcement officer,

the action which the defendant took, which was to terminate him after affording him full due process, which he has taken advantage of -- and again, I'm looking at this as a federal court deciding whether or not there is a federal cause of action that should go forward on this quantum of evidence.

All right, thank you.

Now, Mr. Gardiner, I'm satisfied for the reasons I've already articulated that this is not a case that involves in any respect the First Amendment right to freely associate, nor does it involve any claim of retaliation for exercising such right. This is a case, in my view, of an employment dispute where an employee was terminated for conduct, not association, but for conduct that violated the requirements of the position, and so I've ruled. I'm granting judgment in favor of the defendant.

Thank you.

MS. KILLALEA: Thank you, Your Honor.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

Anneliese J. Thomson

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PAULO FREYESLEBEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 99-1656-A
	)	
COUNTY OF FAIRFAX, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

ORDER

For the reasons stated in open court, defendants' Motion to Dismiss and for Summary Judgment is GRANTED. Accordingly, it is hereby

ORDERED that judgment be and is entered in favor of the defendant pursuant to Fed. R. Civ. P. 58.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 21st day of July 2000.

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia